

SERVED : September 4, 1992

NTSB Order No. EA-3660

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 12th day of August, 1992

THOMAS C. RICHARDS,
Administrator,
Federal Aviation Administration,

Complainant,

Docket SE-10822

v.

THEODORE A. BROWN,

Respondent.

OPINION AND ORDER

The respondent has appealed from the oral initial decision Administrative Law Judge William R. Mullins issued in this proceeding on May 10, 1990, at the conclusion of an evidentiary hearing.' By that decision the law judge affirmed in part an order of the Administrator suspending respondent's airline transport pilot certificate on an allegation that he violated

'An excerpt from the hearing transcript containing the initial decision is attached.

section 91.75(b) of the Federal Aviation Regulations ("FAR") , 14 C.F.R. Part 91,² as a result of a 2,000 foot altitude deviation which occurred when respondent, as first officer of a USAir flight, was manipulating the controls of the aircraft. The law judge did not sustain the additional allegation of a violation of FAR section 91.9. That ruling has not been appealed by the Administrator.³ The sanction was waived by the Administrator because respondent filed a timely incident report under the Aviation Safety Reporting Program.

The facts surrounding the altitude deviation were stipulated to by the parties as follows:

1 On November 4, 1988, respondent acted as first officer on USAir flight 147, from Burlington, Vermont to Pittsburgh, Pennsylvania.

2 During that flight, respondent was manipulating the controls of the aircraft. The pilot-in-command, Ira R. Josephson, was handling the communications on the flight.

3 During the flight, the crew was cleared by Air Traffic Control (ATC) to cross 20 miles east of Keating VOR at an altitude of 22,000 feet.

4. Captain Ira R. Josephson acknowledged the clearance.

²FAR section 91.75(b) provided at the time of the incident as follows:

"§ Compliance with ATC clearances and instructions . . .

(b) Except in an emergency, no person may, in an area in which air traffic control is exercised, operate an aircraft contrary to an ATC instruction."

³FAR § 91.9 provided at the time of the incident as follows:

"§ 91.9 Careless or reckless operation.

No person may operate an aircraft in a careless or reckless manner so as to endanger the lives or property of another.*'

5 Notwithstanding the clearance, which had not been amended, the aircraft descended to an altitude of approximately 20,000 feet.

6 As a result, standard separation was lost between the USAir flight 147 and another aircraft in the vicinity.

Respondent testified that shortly after takeoff the captain pulled out some magazines, put his feet up on the dashboard, and began to read. The captain did not make altitude call-outs, and he missed some of the radio calls.

Respondent admits that he heard the subject ATC clearance, but he claims that he understood it to be 20,000 feet ("two zero zero") , rather than 22,000 feet ("two two zero") . He also admits that the captain acknowledged the clearance correctly, but respondent claims that he also misheard the read back as " two zero zero." Respondent then set 20,000 feet in the altitude alerter. The captain, who was still reading a magazine, did not correct the mistake, nor did he call out the aircraft's altitude, in accordance with the pilot's handbook (Respondent's Exhibit R-2), when the aircraft reached 1,000 feet above the assigned altitude, which would have also caused them to realize respondent's error in setting the altitude alerter before the deviation occurred. Respondent's sole contention on appeal is that because of the captain's negligent performance of his non-flying pilot duties, he should be absolved of responsibility under the FAR for this altitude deviation. The Administrator has filed a brief in reply in which he urges the Board to affirm the initial decision.

Upon consideration of the briefs of the parties, and of the entire record, the Board has determined that safety in air commerce or air transportation and the public interest require affirmation of the Administrator's order, as modified by the law judge. For the reasons that follow, we will deny respondent's appeal.

Respondent's position, that he should not be held responsible because of the captain's negligence is, in the Board's view, untenable. Simply stated, the captain's conduct is irrelevant to our decision here.⁴ The only question to be resolved in this proceeding is whether respondent exercised the care, judgment and responsibility required of an airline transport pilot certificate holder while manipulating the controls of the aircraft. We concur with the law judge's finding that he did not.

The precedent relied on by respondent in support of his argument is clearly distinguishable from the situation here. This is not a case where the flying pilot reasonably relied on the non-flying pilot to properly perform his duties, such as when the non-flying pilot gives the flying pilot misinformation. See, e.g., Administrator v. Coleman, 1 NTSB 229 (1968). The determinative factor in those cases is that the flying pilot's reliance on the non-flying pilot's

⁴The issue as to whether both pilots share responsibility for the deviation is not before the Board in this proceeding. Board precedent is clear, however, that both may be liable under the regulations. See, e.g., Administrator v. McCament and Carmen, NTSB Order No. EA-2864 (1989).

performance was reasonable. Here, respondent knew he could not rely on the captain - in fact, he had already decided that he would report the captain to the company when they landed. Nevertheless respondent did not question the clearance. In fact, he had no discussions with the captain at all.⁵

The Board has stated repeatedly that an ATP must be held to the standard of the highest degree of care, because he or she is entrusted with the safety of the traveling public. Just as a pilot must not rely on an autopilot to satisfy this standard of care, because it may be defective, Administrator v. Baughman, NTSB Order No. EA-3563, recon. denied, NTSB Order No. EA-3640 (1992), so too must he not rely on the non-flying pilot to correct mistakes which he could have and should have avoided, had he exercised reasonable care. Respondent had the duty to monitor ATC communications carefully. Since he misunderstood these communications not once, but twice, we cannot conclude that he monitored these communications carefully enough. Regardless of the unrebutted evidence concerning the deplorable conduct of the captain, we find that respondent must be held accountable because it was his failure

⁵Respondent has apparently abandoned the claim that he was afraid to demand that the captain perform his duties because he feared retribution since he was a probationary employee. In Administrator v. Combs, NTSB Order No. EA-3616 (1992) we recently stated, "An ATP certificate holder exercising the highest degree of safety must, of course, be aware of all factors that may have a bearing on the effective and efficient coordination of personnel resources and should not leave to chance the performance of vital or necessary duties by crewmembers who may not, for whatever reasons, accomplish them . . ." Id. at 6.

to carefully monitor ATC communications which was the actual cause of the altitude deviation, particularly in view of the captain's nonfeasance.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. The Administrator's order, as modified by the law judge, and the initial decision are affirmed.

VOGT , Chairman, COUGHLIN, Vice Chairman, LAUBER, HART, and HAMMERSCHMIDT , Members of the Board, concurred in the above opinion and order.